No. 71-506

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

MIDWEST VIDEO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INDEX

CITATIONS

462-617—72

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The gist of respondent's position before this Court is that cable television [1] is an enterprise separate and apart from television broadcasting. From this premise respondent reaches the conclusion, as did the court

[1] Cable television was formerly called community antenna television (CATV) by the Commission. Because of the broader functions to be served by such systems in the future, the Commission in its Report and Order on *Cable Television Service* of February 12, 1972, 37 Fed. Reg. 3252, adopting a comprehensive set of rules to govern the future growth of the service, has utilized the more accurate term "cable television." Ten copies of the Report and Order have been lodged with the Clerk of this Court.

below, that while the Communications Act confers upon the Commission authority to regulate those cable activities which have a direct impact upon the service rendered to the public by television broadcast stations, it does not confer authority to require cable systems to engage in program origination against their will. The respondent urges, in addition, that the Commission's program origination rule would not be valid even if cable television were deemed to be broadcasting.

This position, in our view, fails to take adequate account of either the precise terms of the Communications Act of 1934 or cable television's relationship to broadcasting. As we pointed out in our opening brief, the Communications Act was designed by Congress to be a broad charter for the future in a field pervasively characterized by dynamism. Congress was more successful in that effort than respondent is prepared to recognize. This Court has already made clear that cable television systems are part of an "essentially uninterrupted and properly indivisible" stream of interstate communications. *United States* v. *South-Western Cable Co.*, 392 U.S. 157, 169. The statute also makes clear that cable television systems, as they now operate, are engaged in communication by radio,[2]

[2] They are, of course, also engaged in communication by wire. See *United States* v. *Southwestern Cable Co.*, *supra*, 392 U.S. at 168 (indicating that cable systems are "within the [statutory] term 'communication by wire or radio'"). Since the rule at issue here applies only to cable systems which pick up and transmit broadcast programs, here as in *Southwestern Cable* the validity of the Commission's action does not depend on whether

since it is a radio signal that they pick up and forward, and since under the Act "Radio communication" means "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b), 47 U.S.C. 153(b). Having "inserted themselves as links in this indivisible stream" and having "become an integral part of interstate broadcast * * * transmission," *General Telephone Co. of Cal.* v. *Federal Communications Commission*, 413 F. 2d 390, 401 (C.A.D.C.), certiorari denied, 396 U.S. 888, cable television systems have undertaken to act as broadcast instrumentalities. While it is unnecessary in the present case to decide whether they fall precisely within the Act's definition of a broadcast station,[3] and we recognize that they differ in important respects from traditional broadcast stations, it is our submission that cable systems have assumed a role as instrumentalities of broadcasting that subjects them to reasonable regulation compatible with

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cable systems are regarded as communication by wire, communication by radio, or both.

[3] Section 3(k) of the Act, 47 U.S.C. 153(k), defines "Radio station" as "a station equipped to engage in radio communication or radio transmission of energy," and Section 3(o), 47 U.S.C. 153(o), states that "'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." A "broadcast station" is "a radio station equipped to engage in broadcasting * * *." 47 U.S.C. 153(dd).

that role—regulation which is not limited to their impact upon traditional broadcasting.[4]

This being so, the remaining issue is whether the Commission's modest requirement of some program origination by cable systems financially able to do so is reasonably related to the public's interest in "the larger and more effective use of radio in the public interest," 47 U.S.C. 303(g), and to the overall public interest standard of the Act applicable to all uses of radio, both broadcast and non-broadcast, 47 U.S.C. 301, 307(a), 308, 309(a).[5] Respondent makes no sub-

[4] Accordingly, the Commission's new rules, adopted in February 1972 (note 1, *supra*), require a form of quasi-license for cable television operations. Cable television systems may not commence operations or add a television broadcast signal to an existing system without obtaining from the Commission a certificate of compliance. Section 76.11, 37 Fed. Reg. 3280. Such a certificate is granted only upon a showing that the system is properly franchised by local authorities under certain standards set by the Commission, and that it will comply with the Commission's substantive requirements on such matters as provision of access channels and the limitations on carriage of non-local television broadcast station signals. The decision to regulate cable television only so far as is necessary for federal purposes comports with the leeway given the Commission by the Act to choose "which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission*, 359 F.2d 282, 284 (C.A.D.C.).

[5] The statutory context here, coupled with the close functional relationship betwen cablecasting and broadcasting, distinguishes cases such as *Frost Trucking Co.* v. *R. R. Commission*, 271 U.S. 583, and *Northern Pacific Railway* v. *North Dakota*, 236 U.S. 585, on which respondent relies. Those cases hold that the power to regulate one activity does not impart power to direct the institution of a different activity with respect to which no regulatory power has been conferred, and that the

stantial argument addressed to this issue, which is not surprising in view of the Commission's established emphasis in allocating television facilities under Sections 303 and 307(b), 47 U.S.C. 303, 307(b), upon the "desirability of having a large number of local outlets," First Report and Order, 38 F.C.C. 683, 699. See also *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 174. To the extent that cable television systems provide an additional means of originating programming, including coverage of public affairs, they clearly enhance the use of radio in the public interest. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367.[6]

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conduct of a lawful activity may not be made conditional upon an unlawful or unconstitutional requirement. But no such unconstitutional requirement is imposed here, since, as we have shown in our opening brief, it would be unrealistic to treat program origination as unrelated to the role cable systems have assumed. Surely Congress is not constitutionally barred from requiring, in a reasonable manner, that cablecasters utilize the technical capacity that is theirs to overcome the limitations on program diversity which are inherent in the broadcast spectrum. Cf. 47 U.S.C. 303(s) (conferring authority on the Commission to require that all new television receivers be equipped to receive UHF as well as VHF broadcasts). And, we submit, in the provisions of the Communications Act to which we have referred, Congress has provided the Commission with sufficient authority and standards on which to base the rule at issue here.

[6] To further implement the objective of increasing program diversification, the Commission's new cable television rules adopted in February 1972 require certain cable systems to provide additional channels without charge, at least for an initial period, for noncommercial public access, educational use, and local government use. Available bandwidth is also required to be utilized for leased access by others. See 37 Fed. Reg. 3269–3272.

It is no answer to suggest (Resp. Br. 18) that even a broadcast station applicant could not be required to locate his station in a community other than the one in which he chooses to locate. No such requirement is involved here. The program origination rule requires only that a person undertaking to bring a broadcast service to the public do so in a manner that will provide a well-rounded service within the context of his undertaking.[7] Nor does *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390, hold to the contrary. That case was concerned not with the reach of the Commission's regulatory jurisdiction, but rather with the wholly different question of the meaning of the term "perform" in the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U.S.C. 1 *et seq.* The systems involved there were held not to "perform" the programs they carried within the meaning of that Act, since they served as an arm of the viewer to enhance his capacity to receive the broadcaster's signal. While that decision thus distinguished between cable television and broadcast television for purposes of copyright infringement,[8] it did not undercut the rationale of *Southwestern Cable* that for regulatory purposes cable

[7] Although the question need not be decided here, there is no reason to assume that in proper circumstances the Commission could not similarly have required standard broadcast (AM) licensees to operate also on frequency modulation (FM) channels, at least temporarily, as a means of developing the FM service. Cf. 47 U.S.C. 303(s).

[8] That case, however, did not involve distant television signals brought to the cable television system's community by microwave relays.

television is an integral part of the interstate flow of television broadcast service.[9]

[9] If the Commission's program origination rule is, as we contend, a reasonable regulation of an interstate activity, the argument for exclusive state control advanced in the *amicus* brief of the State of Illinois of course fails. As we pointed out in our opening brief, the program origination requirement at issue here applies only to cable systems which pick up and transmit broadcast programs, and even with respect to such systems a substantial role has been reserved for state regulatory authority. See the Commission's February 1972 Report and Order, 37 Fed. Reg. at 3275–3277, explaining the dual-jurisdiction relationship of federal and state regulation adopted in the Commission's comprehensive new *Cable Television Service* rules. State regulation which conflicts with federal requirements must, of course, yield (but see n. 6, *supra*, indicating that the Commission's approach is not as completely opposed to that desired by Illinois as that State's *amicus* brief suggests). Moreover, the Commission has acted with cognizance of the particular need for unified federal regulatory authority in this field because of the potential for conflicting state regulation in the many metropolitan areas which cross state lines. Illinois itself, for example, shares some of its most prominent metropolitan areas with at least three other states: Indiana (Chicago-East Chicago-Hammond-Gary), Iowa (Davenport-Rock Island-Moline, also Dubuque-East Dubuque), and Missouri (St. Louis-East St. Louis).

The *amicus* argument of the American Civil Liberties Union that requiring, or even permitting, cable systems to originate programming will induce cable systems to limit their carrier capacity which would otherwise be expanded to meet the demands of others, presents no substantial issue. The *amicus* brief is based solely upon conjecture and takes no account of the further requirements which the Commission has now imposed to require that access be afforded to others, see footnote 6, *supra*, and that cable systems in the top 100 markets have a 20-channel capacity and provide an additional channel suitable for cablecasting and other forms of communication for each broadcast signal carried. See 37 Fed. Reg. 3269. The ACLU

Thus, although cable television need not be viewed as specifically the rendition of a broadcast service to be treated in all respects upon the same basis as traditional television broadcasting, it cannot realistically be viewed, as Midwest Video would have it, as an unrelated enterprise free of reasonable public service responsibilities to the community. As the Commission has recently stated (37 Fed. Reg. 3269):

> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments. * * *

And in its letter to Congress of August 5, 1971, the Commission explained the approach it is taking in this field as one in which it has concluded that risks to the public interest which might result from possible adverse effects of authorized cable operations on broadcast services will be compensated for by utilization of the new technology of cablecasting to provide additional service to the public which was previously unavailable because of the physical limitations of the broadcast spectrum (31 F.C.C. 2d 115, 127):

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brief also ignores the consideration relied upon by the Commission that cablecasting facilities and equipment obtained by a cable system for its own use will also be available for the use of others. See Pet. App. C., p. 39; *Cable Television Service*, 37 Fed. Reg. 3271–3272.

> We will tailor our actions to take into account the public interest considerations stemming from possible impact of cable on broadcast services. We recognize that in any matter involving future projections, there are necessarily some risks. As we have also stated, what makes those risks so clearly worth taking is the chance of obtaining great benefits to the public from cable's new services. It follows that along with making distant or overlapping signals available for the first time in specified markets, we should act to require a bandwidth that will ensure the availability of these new services. Otherwise, some cable operators might construct systems adequate only to the carriage of broadcast signals, or might long postpone the availability of non-broadcast channels. We believe this would be a most unwise decision, since the use of non-broadcast bandwidth is of high public promise and can be profitable to the cable owner. Indeed, it may be the critical factor making for cable's success. The public interest, as well as the cable industry's economic interest, may well be found in reducing subscriber fees and relying proportionately more for revenue on the income from channel leasing. *In sum, we emphasize that the cable operator cannot accept the distant or overlapping signals that will be made available without also accepting the obligation to provide for substantial non-broadcast bandwidth. The two are integrally linked in the public interest judgment we have made.* [Emphasis in original.]

The rule at issue in the present case is thus central, in the Commission's judgment, to fulfillment of its

statutory responsibilities with respect to both television broadcast service and the closely related field of cable television service.

Respectfully submitted.

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